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CHARLES ELMORE GROFF
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JAMES J. LAUGHLIN,

National Press Bldg.,

Washington, D. C.,

Petitioner in Proper Person.

INDEX TO PETITION

	Page
Opinion below.....	2
Jurisdiction.....	2
Questions presented.....	2
Statement of the case.....	2
Specification of errors to be urged.....	4
Reasons for granting the writ.....	5

INDEX TO BRIEF

Brief in support of petition.....	7
Opinions of the courts below.....	7
Jurisdiction.....	7
Statement of the case.....	8
Specification of errors to be urged.....	8
Argument.....	8
1. The United States Court of Appeals for the District of Columbia erred in holding that this case was not within the rule laid down in <i>Nye v. United States</i>	8
2. The Court of Appeals erred in holding that the contempt was in the presence of the Court.....	10
3. The Court of Appeals erred in holding that petitioner was not entitled to a jury trial.....	10
4. The Court of Appeals erred in holding that the petitioner's guilt was established beyond a reasonable doubt.....	12
The affidavit of bias and prejudice against Judge Eicher.....	17
Conclusion.....	21

TABLE OF CASES

<i>Bealands v. United States</i> , 117 F. 2d 958.....	19, 20
<i>Blim v. United States</i> , 68 F. 2d 484.....	12
<i>Bridges v. State of Calif.</i> , 314 U. S. 252; 62 Sup. Ct. 190.	5
<i>Cuddy v. Otis</i> , 33 F. 2d 577.....	19
<i>Currian v. Mourse</i> , 74 F. 2d 273.....	20
<i>Eccentricities of the Law of Contempt</i> , 36 L. G. R. 394.	11
<i>Eilen Becker v. Plymouth County</i> , 134 U. S. 31.....	10

	Page
<i>Ex parte Jones</i> , (1806) 1 Veo, 237.....	15
<i>Flegenheimer v. United States</i> , 110 F. 2d 379.....	20
<i>Gompers v. United States</i> , 233 U. S. 604.....	10
<i>Hutton v. Superior Court of City & County of San Francisco</i> , 81 Pac. 409.....	19
<i>In re Eskay</i> , 122 F. 2d 819.....	13
<i>In re Shortridge</i> , 99 Cal. 526, 34 Pac. 227.....	19
<i>McClatchy v. Superior Court of Sacramento County</i> , 51 Pac. 696, at 697.....	19
<i>Michaelson v. United States</i> , 266 U. S. 42; 45 Sup. Ct. 18.	12
<i>Mitchell v. United States</i> , 126 Fed. 550.....	19
<i>Morrison v. United States</i> , 226 F. 2d 44.....	21
<i>Morse v. Lewis</i> , 54 F. 2d 1027.....	20
<i>Muller v. People</i> , 15 Colo. 437, 9 L. R. A. 566.....	21
<i>Newman v. Zerbst</i> , 83 F. 2d 973.....	20
<i>Proceedings against William Stroud</i> , 3 Howell State Trials 235, 267 (1629).....	11
<i>Nye v. United States</i> , 313 U. S. 33; 61 Sup. Ct. 810..	4, 5, 8, 9
<i>Pendergast v. United States</i> , 317 U. S. 412; 63 Sup. Ct. Rep. 268.....	10
<i>Rex v. Clements</i> , (1821) 4 Barn. & Ald. 218.....	14
<i>Schmidt v. United States</i> , 124 F. 2d 177.....	5, 10
<i>The King v. Almon</i> , 24 L. G. R. 184, 266.....	11
<i>The Nature of Contempt of Court</i> , 37 L. G. R. 191.....	11
<i>The Practice in Contempt Cases</i> , 38 L. G. R. 185.....	11
<i>The Writ of Attachment</i> , 40 L. G. R. 43.....	11
<i>The Summary Process</i> , 25 L. G. R. 238.....	11
<i>Toledo Newspaper Co. v. United States</i> , 247 U. S. 402; 38 Sup. Ct. Rep. 565.....	9, 17
<i>United States v. Balam</i> , 26 Fed. Supp. 491.....	12
<i>United States v. Flegenheimer</i> , 14 Supp. 584.....	20
<i>Whitaker v. McLean</i> , 72 U. S. App. D. C. 259, 118 F. 2d 596.....	17
<i>Woolley et al., v. Superior Court in and for Stanislaus County et al.</i> , 66 Pac. (2d) 680.....	18

STATUTES CITED

<i>Section 241, Title 18, United States Code</i>	9
<i>Section 240(a), Judicial Code (as amended by the Act of Feb. 13, 1925 and the Act of March 8, 1943)</i>	2, 7
<i>Title 23, Section 109, D. C. Code (1940 Edition)</i>	3

IN THE
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No. 481

JAMES J. LAUGHLIN,

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Petitioner,

UNITED STATES OF AMERICA,

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA AND BRIEF IN SUP-
PORT THEREOF.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

James J. Laughlin respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove therefrom, for review here, the record in the case No. 8757, wherein petitioner is appellant and the United States of America is appellee, and in which case that court announced its opinion under date of April 30, 1945 (R. 354) affirming the judgment of the District Court of the United States for the District of Columbia.

Opinion Below

The opinion in the United States Court of Appeals for the District of Columbia has not yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of March 8, 1943. The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, dated April 30, 1945 (R. 354), confirming the judgment of the District Court of the United States for the District of Columbia.

Petition for rehearing was denied May 8, 1945. By orders of this Court the time within which petition for writ of certiorari may be filed has been extended to October 3, 1945.

Questions Presented

1. Whether the matters alleged in the rule to show cause constitute a contempt of court in the presence of the court or so near thereto as to obstruct justice.
2. Whether the rule announced in the *Nye* case, 313 U. S. 33, is controlling here.

Statement of the Case

Petitioner is a member of the bar of this Court as well as the District Court of the United States for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the bar of other State and Federal Courts. He represented two defendants in the so-called sedition case. That case was properly designated Criminal No. 73086, in the District Court of the United States for the District of Columbia, and at the outset there

were thirty defendants. The trial began April 17, 1944, and ended in a mistrial on December 7, 1944, due to the death of the presiding judge, the late Honorable Edward C. Eicher, Chief Justice, District Court of the United States for the District of Columbia, and the presiding judge at the sedition trial.

A Petition for rule to show cause was served on petitioner. The petition stated in substance that petitioner had filed certain motions to subpoena various witnesses at the expense of the United States and also had certified to an affidavit of bias and prejudice against Chief Justice Eicher, said affidavit having been executed by one of the defendants represented by petitioner, Robert Noble.

It should be pointed out at this stage that there is a special statute in the District of Columbia permitting indigent defendants to summon various witnesses on behalf of the defendant and at the expense of the United States (Title 23, Section 109, District of Columbia Code, 1940 Edition). This section of the Code provides that the defendant make application under oath before the trial, or in cases of manifest necessity during the trial, setting forth that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses and setting forth also the names of such witnesses and what he expects to prove by them in order that the Court may be advised whether or not the testimony be material to the issue.

The theory of the contempt citation was that the various motions were not filed in good faith but were filed with an attempt to obtain undue publicity and thus hamper the selection of jurors. However, it should be stated at this point that no evidence was offered at the contempt hearing that any juror had read any of the articles relating to the motions filed by the petitioner or had been

influenced or prejudiced by reason of such motions and hence no jurors were disqualified on this account.

As to the allegations relating to the filing of the affidavit of bias and prejudice against Chief Justice Eicher, the contention was made that the affidavit was not filed in good faith but was filed with the intent and purpose to embarrass Judge Eicher and to prevent a fair and impartial trial.

The record shows that at the time the affidavit of bias and prejudice was filed the court was not in session and in fact the affidavit of bias and prejudice was filed with the Clerk at a time when the Judge was not on the bench and not in the courtroom. As to the various motions the record will show that the motions were filed with the Clerk and were not filed in the presence of the court and were filed at a time when the court was not on the bench or in the courtroom. The publicity resulting from said motions of course took place in various newspapers far removed from the courthouse.

In the hearing in District Court petitioner was found guilty and fined one hundred and fifty dollars (R. 27). The Court of Appeals affirmed the judgment of the District Court (R. 359).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the contempt was not within the rule *laid down in Nye v. United States*, 313 U. S. 33.
2. In holding that the contempt was in the presence of the Court.
3. In holding that petitioner was not entitled to a jury trial.
4. In holding that the petitioner's guilt was established beyond a reasonable doubt.

Reason for Granting the Writ

1. The opinion of the United States Court of Appeals for the District of Columbia in this case is in conflict with the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Schmidt v. United States*, 124 F. (2d) 177.
2. The United States Court of Appeals for the District of Columbia has not given proper effect to the opinion of this Court in the case of *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, and *Bridges v. State of California*, 314 U. S. 252, 62 S. Ct. 190.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8757, James J. Laughlin, appellant, versus United States of America, appellee, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Petitioner, in Proper Person.

IN THE
SUPREME COURT OF THE UNITED STATES
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BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion below announced April 30, 1945, appears in the record at pages 354. Rehearing was denied May 8, 1945.

The memorandum opinion of the District Court will be found in the record at pages 25.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case

A concise statement of the case containing, as the petitioner believes, all that is material to the consideration of the questions presented is set forth in his petition and is not repeated here.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the contempt was not within the rule laid down in *Nye v. United States*, 313 U. S. 33.
2. In holding that the contempt was in the presence of the Court.
3. In holding that petitioner was not entitled to a jury trial.
4. In holding that the petitioner's guilt was established beyond a reasonable doubt.

ARGUMENT

1. **The United States Court of Appeals for the District of Columbia erred in holding that this case was not within the rule laid down in *Nye v. United States*.**

It is significant in the opinion of the United States Court of Appeals for the District of Columbia that no reference whatever is made to the case of *Nye v. United States*. In the instant case it cannot be disputed that when the various motions were filed they were filed with the clerk of the Court and in the office of the clerk some distance from the courtroom and at a time when the Judge was not on the bench or in the courtroom. It also cannot be disputed that the affidavit of bias and prejudice was filed with the Clerk at a time when the Judge was not on the

bench and not in the courtroom. Therefore it would seem that the case comes squarely within the *Nye* case. The ruling of the court below would have been entirely proper if that court took as its authority the case of *Toledo Newspaper Company v. United States*, 247 U. S. 402, 38 S. Ct. Rep. 565, but it must be remembered that *Toledo Newspaper Company v. United States* was overruled by *Nye v. United States*, 313 U. S. 33. We find in *Nye v. United States* the following:

“* * * The phrase ‘so near thereto as to obstruct the administration of justice’ likewise connotes that the misbehavior must be in the vicinity of the court. * * * It is not sufficient that the misbehavior charged has some direct relation to the work of the court. ‘Near’ in this context, juxtaposed to ‘presence’, suggests physical proximity not relevancy. In fact, if the words ‘so near thereto’ are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of ‘misbehavior’ which will ‘obstruct the administration of justice’ but which may not be ‘in’ or ‘near’ to the ‘presence’ of the court. Broad categories of such acts, however, were expressly recognized in Section 2 of the Act of March 2, 1831 and subsequently in Section 135 of the Criminal Code.”

It is recognized in this ruling that many acts may be done in connection with judicial proceedings that would not constitute contempts in the presence of the court, but which would not go unpunished. Section 241, Title 18 of the United States Code provides punishment for such acts and surrounds the accused with the safeguards of a criminal trial including the right to trial by jury. We believe that this Court in the *Nye* case was of the view that the courts had unduly expanded the right to punish by contempt and laid down a rule of procedure in the *Nye* case that limited the power of Federal courts to punish for contempt.

We believe that is well illustrated in the case of *Schmidt v. United States*, 124 F. (2d) 127 C. C. A., Ohio. In that case it was held that where a defendant had filed an affidavit in the Clerk's office it was not in the presence of the court or so near thereto as to obstruct the administration of justice in that it did not appear that the court was in session at the time and therefore the defendant could not be adjudged in contempt of court.

2. The Court of Appeals erred in holding that the contempt was in the presence of the Court.

We believe that this point is covered by the first point and that the matter is controlled by the decision in the *Nye* case.

We believe it well to refer to the case of *Pendergast v. United States*, 317 U. S. 412; 63 S. Ct. Rep. 268. That case turned on the statute of limitations and the court left undecided whether the action of Pendergast and others constituted punishable contempt.

3. The Court of Appeals erred in holding that petitioner was not entitled to a jury trial.

Petitioner concedes that under the common law in a case of this kind an accused would not be entitled to a trial by jury. However, it is contended that in view of the construction now placed upon contempt of court as outlined in the case of *Nye v. United States* and *Bridges v. State of California*, that in a case such as this the right of trial by jury is permitted.

While there is considerable language in the opinions relating to contempt that such actions are "quasi-criminal" and do not qualify as full-fledged crimes and hence do not warrant a trial by jury which contention is amply supported by decisions (*Eilen Becker v. Plymouth County*, 134 U. S. 31; *Gompers v. United States*, 233 U. S. 604), neverthe-

less, modern research indicates that these decisions are based on the *Almon* case and conclusions reached by Mr. Justice Blackstone in his Commentaries, based again on the *Almon* case, are erroneous.

As was stated by an eminent jurist while a professor of law:

"Building on the earlier researches by Mr. Solley Flood, the Senior Master of the English Chancery Division, Sir John Charles Fox, in a notable series of essays has rendered luminously clear the common law history of procedure governing the trial of criminal contempt."

The King v. Almon, 24 L. G. R. 184, 266.

The Summary Process, 25 L. G. R. 238.

Eccentricities of the Law of Contempt, 36 L. G. R. 394.

The Nature of Contempt of Court, 37 L. G. R. 191.

The Practice in Contempt Cases, 38 L. G. R. 185.

The Writ of Attachment, 40 L. G. R. 43.

"Down to the early part of the 18th century cases of contempt even in and about the common law courts when not committed by persons officially connected with the court, were dealt with by the ordinary course of law; i. e., tried by jury except when the offender confessed or when the offense was committed 'in the actual view of the court' * * * The reason for the rule was found in the very conception of criminal contempt. Selden gives us the meat of the matter. 'Contempts are only trespasses, etc., and punishable only by fine and imprisonment or by both but not until conviction of the parties (as neither are other like offenses) unless the contempt be in the face of some court against which it is committed, which supplies a conviction.'" (*Proceedings against William Stroud*, 3 Howell State Trials 235, 267 (1629)).

"But after the Star Chamber appeared on the scene it assumed authority over contempts against any court and it asserted its power, unlike the common law courts, by a summary procedure without a jury

(24 L. G. R. 271 et seq.). The Star Chamber was abolished in 1641. But the atmosphere of corrupt and arbitrary practices which it had generated partly survived. Gradually there appear traces of infection in the King's Bench which succeeded to the Court of Star Chamber (24 L. G. R. 271). • • • Thus, gradually the summary process of the Star Chamber slipped into the common law courts, rendered also somewhat familiar by a series of statutes which gave the courts authority over some special offenses without trial by jury (25 L. G. R. 354). Nevertheless, until 1720 there is no instance in the common law precedents of punishment otherwise than after trial in the ordinary course and not by summary process • • • The original rolls of the English courts to the remotest times crushingly disprove Wilmot's claim (in *Rex v. Almon*). The ground of Wilmot's assumption that contempts out of court were punishable by summary process in accordance with 'immemorial usage' has been swept away by the learned labors of Sir John Charles Fox."

4. The Court of Appeals erred in holding that the petitioner's guilt was established beyond a reasonable doubt.

It is contended that in a contempt case presumption of innocence obtains and triers must be satisfied beyond a reasonable doubt of accused's guilt. See *Michaelson v. United States*, 266 U. S. 42, 45 S. Ct. 18. See also *United States v. Balam*, 26 Fed. Supp. 491.

In the case of *Blim v. United States*, 68 F. 2d 484, it was held:

"Contempt proceeding for obstruction of justice by means of false testimony before grand jury being criminal in nature, respondent is presumed to be innocent, and must be proved guilty beyond a reasonable doubt."

In the recent case of *In re Eskay*, 122 F. 2d 819, it was held:

"Where contempt has not been committed in the presence of the court and evidence must be taken to establish the contempt, the court's summary powers are curtailed to the extent that accused must be presumed to be innocent, need not testify against himself and must be found guilty beyond a reasonable doubt."

Rules for preserving discipline, essential to the administration of justice came into existence with the law itself and contempt of court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time.

The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the court, (1) enforcement of the process and orders of the court, disobedience to which may be described as "civil" contempt and (2) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the court while it is sitting or libeling the judge or publishing comments on a pending case which are both distinguished as criminal contempt:

Civil contempt is a wrong for which the law awards reparation to the injured party, which, though nominally contempt of court is a wrong of private nature between subject and subject and the punishment is a form of execution for enforcing the rights of a suitor. Actions of criminal contempt are those proceedings used to vindicate the authority of the court.

The leading case on the procedure for punishment of contempt of court and the root of the present practice in cases of criminal contempt is *King v. Almon*, in which a bookseller was tried for libel of Chief Justice Mansfield and a judgment was prepared but never delivered by

Mr. Justice Wilmot. This judgment, written in the year 1765 holds that a libel on a judge in his judicial capacity is punishable by the process of attachment, without the intervention of a jury and that this summary form of procedure is "founded on immemorial usage" (Wilmot's Notes, p. 243).

Blackstone enumerates various classes of contempts and amongst them contempts by speaking or writing contemptuously of the court or judges acting in their judicial capacity by printing false accounts of pending causes. He adds "The process of attachment for these and like contempts must necessarily be as ancient as the laws themselves" (4 Commentaries 286).

However, he also points out that summary punishment for contempt out of court and the use of attachment and the examination of the accused by interrogatories (an English practice) rendered "this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance" (4 Commentaries 287-288).

It is probable that Blackstone was influenced by Wilmot in arriving at this determination of the law since it is known that portions of the Commentaries were submitted to Wilmot by Blackstone for the former's approval (Wilmot's Memoirs, p. 201).

The first reported case in an English Court in which the undelivered judgment in *Almon's* case was cited and adopted by the court is *Rex v. Clement*, which involved the liability of the defendant for contempt for publishing a report of a trial in violation of a court injunction. The King's Bench did not rule on the contempt, merely holding that the injunction was valid and an indictment for contempt unnecessary. The court in its opinion refers to Wilmot's decision in *Almon's* case and indicates its approval of the rule (*Rex v. Clements*, (1821) 4 Barn & Ald. 218).

Summary trial in constructive contempt cases in England received a set-back in the case of William Bingley due primarily to the obstinacy of the respondent. Bingley was publisher of the "North Briton," a newspaper in which the publisher charged Lord Mansfield of having acted as counsel for the prosecution in the *Wilkes* case. In June, 1768, Bingley was brought before the court upon a writ of attachment and committed to Newgate. In January, 1769, he was again committed and refusing to enter into a recognizance to answer interrogatories he remained in prison until June, 1770. Thus it became apparent that the defendant might remain in jail the rest of his life but this dilemma was avoided by the Attorney General who himself applied to the court for discharge. The result of this case was to give a decided check to attachments for contempt out of court. In 1793 Bingley wrote that since his case there had been no attachments for constructive contempts in the intervening twenty-four years (Bingley's case, 1768 (not reported)).

In 1785 Lord Erskine, then at the Bar, wrote an opinion laying down the principle that no crime can be considered a contempt of any particular court so as to be punishable by attachment unless the act which is the object of the punishment be in direct violation or obstruction of something previously done by the court which issues it and which the party attached was bound by some antecedent proceeding of it to make a rule of his conduct.

Lord Erskine when Lord Chancellor acted upon this principle in an important case and indicated that he was not prepared to subscribe to the doctrine that constructive contempt is punishable by attachment (*Ex parte Jones*, (1806) 1 Vero. 237).

This decision of the eminent judge was due to the antipathy toward summary punishment of contempts of court based on the doctrine in *Almon's Case* and the assumption of

the eminent justice that such was the law and that it had so existed from "time immemorial" although as Blackstone pointed out, it was an anomaly in the English jurisprudence.

The first case in the United States involving interpretation of the *Almon* case was the impeachment of Judge Peck in 1831 before the Senate of the United States on the charge that, while sitting as a judge of a district court, he had caused an attachment for contempt to issue against one Lawless, an attorney practicing in his court and had summarily (without jury) sentenced him to twenty-four hours imprisonment and suspended him from practice for eighteen months. The contempt consisted of publishing in a newspaper a letter which the judge held to be a libel on himself in his judicial capacity.

Almon's Case was the principal authority relied upon. James Buchanan, the Chief Manager of the impeachment, a distinguished member of the bar and later President felt otherwise and argued that *Almon's case* is no case at all but merely an opinion of a judge which was never delivered and that the power to punish the offense of scandalizing a court is a Star Chamber power.

That this was his firm conviction was indicated by the fact that immediately upon the acquittal of Judge Peck by a vote of 22 to 21, Buchanan took action to fulfill the pledge made in his closing argument when he said:

"I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power and Mr. Lawless has been its last victim."

(Report of the Trial of James H. Peck, p. 430.)

On the day after the acquittal, as head of the Judiciary Committee of the House, Mr. Buchanan drafted an act to limit the power of the Federal judiciary in constructive con-

tempts. This statute is now Section 385 of the United States Code (Judiciary) and Section 241 of the United States Code (Criminal). One provision of Section 385 being:

“That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice.

* * *

under which section the present matter is apparently brought.

For a definition of “misbehavior” see the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co. v. United States*, (1918) 247 U. S. 402.

For definition of “so near thereto as to obstruct” see *United States v. Nye, supra*.

The Affidavit of Bias and Prejudice against Judge Eicher. As will be noted in the opinion of the Court of Appeals the case largely turned on the matter of the affidavit of bias and prejudice. An attorney, of course, has a right to file an affidavit of bias and prejudice against a judge in a federal court. It is true that a strict interpretation of the statute would require that such an affidavit be filed ten days before the beginning of the trial. However it has been generally recognized in the District of Columbia due to the fact that there are twelve judges on the local court that the time limitation is not strictly adhered to in this jurisdiction. As a matter of fact the Court of Appeals in the case of *Whitaker v. McLean*, 72 U. S. App. D. C. 259; 118 F. 2d 596, recognized that where a trial judge manifests prejudice and bias after a trial is in progress he can still be disqualified. It must be remembered that when the affidavit of bias and prejudice against Judge Eicher was filed

the jury had not yet been sworn. The record will show that there was widespread dissatisfaction with the conduct of Judge Eicher in the sedition trial. The record will show that some sixteen attorneys had joined in a motion asking Judge Eicher to disqualify himself due to his showing of bias and prejudice. If the defendants or any of them honestly believed that there had been an agreement between the late President Roosevelt and the late Judge Eicher as to the conduct of this case, clearly it would unfit Judge Eicher to proceed further in the case. No person now living can say with positiveness that the allegations in the affidavit of bias and prejudice were untrue. If the defendants honestly believed that there was an understanding between the late President Roosevelt and the late Judge Eicher, it would be his duty to make that fact known. We say further that it would be the duty on the part of the attorney for the defendants to certify to the fact that the affidavit of bias and prejudice was filed in good faith. We are not unmindful that an attorney has a duty to maintain proper respect for the Judiciary. It also follows that if an attorney has any evidence as to any misconduct as to the Judiciary it is likewise his duty to make that fact known. We know from human experience that many many things have happened in this country within the past ten years that has shaken the confidence of the public among certain of the Judiciary and very properly so.

In the case of Woolley et al. v. Superior Court in and for Stanislaus County et al., 66 Pac. (2d) 680, we find this:

"We cannot agree with the trial court however, that the presentation or the filing of the statement of disqualification constituted a contempt of the court.
* * * No criticism can be made of the manner of presentation, and we must assume, in the absence of any reply by the trial judge, that counsel acted in good faith in the recital of the facts upon which they base their allegations of bias and prejudice."

"We are now passing upon the conduct or remarks of counsel during the progress of a protracted trial, carried on during the very hottest part of an extremely hot summer in the San Joaquin Valley, and in a hall probably not conveniently arranged, but only with the time and manner of presenting this charge of disqualification. We cannot find in that alone sufficient grounds to uphold the judgment of contempt. That portion, therefore, of the judgment finding those attorneys who presented the statement of disqualification guilty of contempt is set aside."

In *McClatchy v. Superior Court of Sacramento County*, 51 Pac. 696, at 697, we find the following:

"The publication of the truth as to legal proceedings is not a contempt of court" (citing *In re Shortridge*, 99 Cal. 526, 34 Pac. 227).

In the case of *Hutton v. Superior Court of City and County of San Francisco*, 81 Pac. 409, we find this:

"Contempt proceedings are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense."

In the case of *Mitchell v. United States*, 126 Fed. 550, the Court said:

"But the statute, by its own terms, provides a safeguard against the abuse of the privilege granted by the statute, and that well-founded safeguard is the requirement that the affidavit must be accompanied by a certificate of counsel of record, and without which the affidavit is ineffectual to disqualify the judge. This requirement is founded on the assumption that a member of the bar or counsel of record will not indulge in reckless disregard of the truth, and further attests to the good faith and belief of the affiant. Citing *Bealand v. U. S.*, 117 F. 2d 958; *Cuddy v. Otis*, 33 F. 2d 577;

Morse v. Lewis, 54 F. 2d 1027; Currian v. Mourse, 74 F. 2d 273; Newman v. Zerbst, 83 F. 2d 973."

In the case of *Bealands v. United States*, 117 F. 2d 958, the Court said:

"A judge may not consider the truth or falsity of allegations in an affidavit of personal bias and prejudice and the provision requiring the certificate of a member of the bar is a precaution against abuse of the privilege afforded by the act. The good faith certificate of counsel of record is indispensable and affidavits which are not accompanied by the certificate are insufficient and may not be filed."

In the case of *Flegenheimer v. United States*, 110 F. 2d 379, the Court said:

"We find no improper conduct in the counsel of the deceased certifying to the good faith of deceased's affidavit of bias and it is not necessary for us to decide, and we do not decide, the question of whether that affidavit was well founded or not. That question is not before us and not necessary to our decision. But we find nothing to impugn the good faith of Governor Silzer and his associates in the surrender of the deceased to the Commissioner or in signing the certificate which the statute provided for. That they tried to induce the deceased not to file the affidavit does not imply that they used bad faith thereafter in signing it, as long as the deceased honestly believed that the Judge was biased and stated on what facts he based his opinion, it was his right to call on his counsel to give the certificate provided by the statute in order to have the question of bias determined."

In the same case, *United States v. Flegenheimer*, 14 Supp. 584, the Court said:

"Counsel can hardly be required to certify to the good faith of a client. They cannot be asked to set themselves up as guarantors of his mental processes.

They can only be required to certify with regard to their own.

In the case of *Morrison v. United States*, 226 F. 2d 444, the Court said:

"Upon examination of this section of the statute, and of the decisions construing the same, we are constrained to the opinion that it was not within the province of the trial judge to pass upon the good faith of the defendant, the affidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith."

In this connection we call attention to 29 A. L. R., Note 1276, and the authorities collected therein. We also call attention to the case of *Muller v. People*, 15 Colo. 437, 9 L. R. A. 566, wherein it was held that an affidavit of bias and prejudice was not contempt of court.

Conclusion

We say therefore that the United States Court of Appeals has not given proper effect to the decision of this Court in the *Nye* case. We say also that there is a conflict in the opinion in this case with the opinion of the Sixth Circuit in the *Schmidt* case and that therefore certiorari is justified.

In view of what has been said it is respectfully submitted that petition for writ of certiorari should be granted.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Petitioner, in Proper Person.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	8
Conclusion.....	17
Appendix.....	18

CITATIONS

Cases:

<i>American Brake Shoe and Foundry Co. v. I. R. T. Co.</i> , 6 F. Supp. 215.....	12
<i>Bradley, Ex parte</i> , 7 Wall. 364.....	13
<i>Bridges v. California</i> , 314 U. S. 252.....	15
<i>Clark v. United States</i> , 289 U. S. 1.....	13
<i>Cooke v. United States</i> , 267 U. S. 517.....	11, 14
<i>Davis, Ex parte</i> , 112 Fed. 139.....	13
<i>Eilenbecker v. Plymouth County</i> , 134 U. S. 31.....	16
<i>Froelich v. United States</i> , 33 F. 2d 660.....	11
<i>Gompers v. United States</i> , 233 U. S. 604.....	16
<i>Hudgings, Ex parte</i> , 249 U. S. 378.....	16
<i>Hume v. Superior Court</i> , 17 Cal. (2d) 506.....	12
<i>Interstate Commerce Commission v. Brimson</i> , 154 U. S. 447.....	16
<i>Michael, Matter of</i> , No. 38, decided November 5, 1945.....	13
<i>Mitchell v. United States</i> , 126 F. 2d 550, certiorari denied, 316 U. S. 702.....	11
<i>Myers v. United States</i> , 264 U. S. 95.....	16
<i>Nye v. United States</i> , 313 U. S. 33.....	12, 13, 14, 15
<i>Paris, In re</i> , 4 F. Supp. 878.....	12
<i>Presentment by Grand Jury of Ellison, In re</i> , 44 F. Supp. 375, affirmed, 133 F. 2d 903, certiorari denied, 318 U. S. 791.....	15
<i>Savin, Petitioner</i> , 131 U. S. 267.....	14
<i>Schmidt v. United States</i> , 115 F. 2d 394, 124 F. 2d 177.....	15
<i>United States v. Ford</i> , 9 F. 2d 990.....	12
<i>United States v. Green</i> , 85 Fed. 857.....	13

Statutes:

Fifth Amendment.....	16
Sixth Amendment.....	16
28 U. S. C. 25.....	10
Sec. 268 of the Judicial Code (28 U. S. C. 385).....	1, 12, 14
D. C. Code (1940), Title 23, § 109.....	9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioner's conviction of contempt of court (R. 354-358) has not yet been reported. The court's supplemental opinion upon petition for rehearing, which is not included in the transcript of record (cf. fn. 1, p. 12, *infra*), is copied in the Appendix, *infra*, pp. 18-19.

JURISDICTION

The judgment of the Court of Appeals was entered April 30, 1945 (R. 359), and a petition for rehearing was denied May 8, 1945 (R. 360).

By orders of the Chief Justice and Mr. Justice Black the time within which to file a petition for a writ of certiorari was extended to October 3, 1945, and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of petitioner's guilt.
2. Whether the misbehavior of petitioner, an attorney representing certain defendants in a pending criminal trial, was punishable under the contempt statute.
3. Whether petitioner was entitled to trial by jury.

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides, so far as pertinent:

The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, * * *.

STATEMENT

On May 10, 1944, petitioner was adjudged in contempt of the District Court of the United States for the District of Columbia following a hearing before Justice Jennings Bailey of that court, and was sentenced to pay a fine of \$150 (R. 181-183).

The petition for an order to show cause why petitioner should not be held in contempt (R. 1-11) alleged that petitioner was a member of the bar of the District of Columbia, and was attorney of record for Robert Noble and Edward James Smythe, two of the defendants in the case of *United States v. Joseph E. McWilliams et al.*, which came on for trial in the District Court for the District of Columbia on April 17, 1944, before the late Chief Justice Edward C. Eicher; that on April 14, prior to commencement of the trial, the court ruled that it would not consider motions for the summoning of defense witnesses at Government expense until approximately two weeks before the close of the Government's case, which was expected by both sides to take at least two months; that on April 20, 1944, the selection of a jury began; that on three separate days thereafter, April 24, 26, and 29, during the impaneling of the jury, petitioner filed in court motions to summon witnesses containing sensational allegations involving well-known persons which were not remotely pertinent to the case on

trial and which were not intended to accomplish any legally proper purpose in connection with the defense of petitioner's clients, but were filed merely as an excuse and as a vehicle for making statements to the public press concerning the motions for the sole purpose of bringing to the attention of members of the jury panel allegations of matters which were not admissible in evidence and charges which would cause the prospective jurors to form opinions as to the guilt or innocence of the defendants in order either to disqualify or improperly to influence them; that in continuance of his purpose, and with the additional aim of embarrassing the trial judge and coercing him to recuse himself, on April 26 petitioner filed an affidavit of bias and prejudice with the court, making scandalous, insulting, and scurrilous allegations attacking the integrity of the trial judge and the court, without attempting in good faith to pursue the statutory requisites for the privileged filing of such a document; and that petitioner's actions tended to and did obstruct the due administration of justice.

The relevant facts established at the hearing and admitted by petitioner's answer to the order to show cause, are as follows:

The charge against petitioner's clients in the case of *United States v. Joseph E. McWilliams et al.* was that of conspiring to impair the morale of the armed forces (18 U. S. C. 9), in violation of 18 U. S. C. 11 (R. 261-270).

On April 14, 1944, petitioner had submitted a motion to subpoena, at Government expense, General Short and Admiral Kimmel on behalf of his client Robert Noble. At that time and on April 17, the first day of trial, the court ruled, the Government acquiescing, that it would not consider motions of this nature until approximately two weeks before the close of the Government's case, which it was expected by both petitioner and the Government would take several months. (R. 140, 175, 213, 214, 250-252.)

On Sunday, April 23, petitioner took to the office of a newspaper reporter, for publication, a copy of a motion, on behalf of his client Smythe, to summon Henry Ford and Charles A. Lindbergh, informing the reporter he would file it the following day (R. 41-42). The motion was filed on Monday, April 24, alleging that the prosecution was brought in bad faith by the Roosevelt administration at the direction of influences inimical to the best interests of the Government, and that the testimony of Ford and Lindbergh would show that they had made anti-Semitic statements more pronounced than any of the writings of the defendant Smythe, but, nevertheless, were not prosecuted for sedition (R. 2, 18, 258-260).

On the same Monday, petitioner turned over to a newspaper reporter, for publication on Tuesday, a copy of a letter addressed to the President of the United States, making similar charges, and, in addition, that certain unknown influencees had

prevailed on the administration to initiate the prosecution to "smear" the names of certain high patriotic officials; that if the prosecution was not halted, the developments at the trial would create a wave of hostility toward the Jewish race; and that the trial would continue until the following election day when there would be a change of administration (R. 9, 54).

On the following day, Tuesday, April 25, petitioner turned over to still another newspaper reporter, for publication on Wednesday, a copy of a motion, on behalf of Smythe, to be filed to summon Congressman Martin Dies, Attorney General Francis Biddle, and Justice Matthew F. McGuire (R. 10, 23-24). The motion made allegations similar to the previous document, and, in addition, charged that Dies had attempted to warn the United States of the Japanese attack, but had been frustrated by Biddle and McGuire, as Acting Attorney General. Petitioner filed this motion on Wednesday, April 26. (R. 4, 7, 313-318.)

On Wednesday, April 26, petitioner also transmitted to the office of a newspaper reporter, for publication the following day, an alleged affidavit of bias and prejudice against the trial judge, which he filed the same day in court (R. 55, 74, 150, 172, 321-322). The affidavit alleged that some two years before the trial, the President had called in Attorney General Biddle and directed him to institute the prosecution of the *McWilliams* case; that the Attorney General replied that there was

no possibility of securing a conviction, but that the President said he would pick the judge before whom the case would be tried; that shortly thereafter the President appointed Chief Justice Eicher to the District Court bench; that the President had promised Chief Justice Eicher a higher judgeship if he would secure convictions in the *McWilliams* case; and that Chief Justice Eicher would do his utmost to convict the defendants. The affidavit, sworn to by petitioner's client Noble, stated that it could not have been filed sooner due to the fact that the information contained therein came to the client's attention only on Tuesday, April 25, and it was filed at the earliest possible date. Petitioner certified that the affidavit was filed in good faith and not for the purpose of delay. (R. 321-322.)

On Saturday, April 29, petitioner prepared and had Smythe swear to two motions; one to summon the then Director of War Mobilization, James F. Byrnes, and the other to summon Harry Hopkins and David Niles, Administrative Assistants to the President (R. 177-178). The substance of the first motion was that Byrnes had visited Germany, made statements complimentary to the Nazi regime, and had given the Nazi salute (R. 319-320). The second motion charged that the prosecution was part of an "unholy conspiracy," that Hopkins and Niles had taken some part in the prosecution and participated in other matters, such as

the attempt to "purge" Senator Guy M. Gillette in the 1938 election (R. 256-257). On the same day, petitioner showed a copy of the motion to summon Byrnes to a newspaper reporter, and told him he would file another motion to summon Hopkins and Niles on the following Monday (R. 61-63, 177). Only the first of these motions was, in fact, filed; that motion was filed on Saturday, April 29, (R. 177-179). The order to show cause was served upon petitioner on the same day (R. 12).

Additional evidence will be discussed in the Argument.

Following the hearing, Justice Bailey held that petitioner's purpose in filing the motions and the affidavit was to gain publicity in order to embarrass the trial judge and influence prospective jurors as to the guilt or innocence of the defendants, and that the charges of the contempt petition were substantially established by the evidence (R. 181-183).

The Court of Appeals for the District of Columbia affirmed (R. 359).

ARGUMENT

I

Contrary to petitioner's contention (Pet. 4, 8, 12-21), we submit that the evidence is amply sufficient to sustain the conviction.

The motions filed by petitioner clearly showed that the desired testimony of the individuals named therein could not even remotely be perti-

nent to the issues on trial and that petitioner, an attorney of considerable experience (see R. 153), could not have believed them so. The statute, D. C. Code (1940), Title 23, § 109, requires that, except in "cases of manifest necessity," motions to summon defense witnesses at Government expense be filed prior to trial. The evidence showed that, with the acquiescence of the Government, the trial court had ruled, to petitioner's knowledge, that it would not consider such motions until shortly before the close of the Government's case, which both petitioner and the Government anticipated would take several months. It was also shown without dispute that the names of the persons listed in the motions had not just been given to petitioner by his client Smythe from day to day during the choosing of the jury, but at least a month before the trial began. (R. 126-130, 140.) Further evidence of petitioner's purpose in filing the motions was shown by his conduct in the courtroom on April 24, when he, one of 22 defense counsel, personally challenged 22 of 45 jurors excused because they had read about the case in the newspapers and formed fixed opinions concerning it (R. 48-49, 221-224). When four of approximately 90 jurors indicated they had not read anything about the case, petitioner remarked, "I must be slipping" (R. 50-51, 52).

Hence, Justice Bailey could properly infer that the filing of the separate motions on different days during the selection of the jury was "not

to protect the interest of his clients, but to embarrass the trial justice in his handling of the case, and to cause unnecessary delay by giving to the press copies of his proposed motions, for the purpose largely of making the panel of prospective jurors incompetent, and for the purpose of bringing to the public the charges which he was making, and thereby to render it still more difficult to obtain a jury for the trial of the case" (R. 181, 183).

As the Court of Appeals stated, the filing of the motions was of comparatively minor importance compared with petitioner's certifying to the good faith of the affidavit of bias and prejudice sworn to by his client Noble (R. 358). His actions in this respect were plainly contempt of court without more. The statute, 28 U. S. C. 25, requires that such an affidavit "shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file within such time." It also requires that the affidavit be accompanied by a certification of counsel of record that it is made in good faith.

The evidence at the hearing showed clearly that neither petitioner nor his client was in possession of any facts to support the statements in the affidavit of bias and prejudice. Noble testified that the information contained in the affidavit was derived mainly from rumors he had heard in

jail, and he was vague concerning the sources of such rumors (R. 93-104, 111-114). Petitioner admitted that he did not believe Noble (R. 144-145). He did not investigate any of Noble's informants, nor even obtain their names, and he did not make any investigation independent of Noble (R. 156, 161-162). Moreover, while Noble swore in the affidavit that the information contained therein had come to his attention only the day before, all the information embodied in the affidavit was known to both petitioner and Noble at least a month before the trial (R. 88, 93-99, 114, 156-157, 171). It is evident, therefore, that there was no basis for the certificate of petitioner, as counsel, that the affidavit was filed in good faith.

The trial court was, consequently, fully justified in finding that the affidavit, like the motions to summon witnesses, was filed "to gain publicity of the charges made in the affidavit in order to embarrass the trial judge and for the purpose of bringing to the attention of prospective jurors these charges in order that they might form an opinion as to the case and prejudge the guilt or innocence of the defendant" (R. 182-183). The reckless attack embodied in the affidavit upon the integrity of the trial court, not in pursuance of any proper or legal purpose, clearly constituted contempt of court. Cf. *Cooke v. United States*, 267 U. S. 517; *Froelich v. United States*, 33 F. 2d 660, 663 (C. C. A. 8); *Mitchell v. United States*,

126 F. 2d 550, 552 (C. C. A. 10), certiorari denied, 316 U. S. 702; *American Brake Shoe and Foundry Co. v. I. R. T. Co.*, 6 F. Supp. 215, 219 (S. D. N. Y.); *United States v. Ford*, 9 F. 2d 990, 992 (D. Mont.); *In re Paris*, 4 F. Supp. 878, 884 (S. D. N. Y.); *Hume v. Superior Court*, 17 Cal. (2d) 506 (1941).

II

Petitioner also contends (Pet. 4, 8-10) that his actions did not take place in the presence of the court or "so near thereto" in a geographical sense as to come within the prohibition of 28 U. S. C. 385, as construed in *Nye v. United States*, 313 U. S. 33, so that such actions could not be punished by the court, even if they did constitute contempt.¹ There is clearly no merit in this contention.

In the first place, the authority of a court to punish summarily for contempt is not limited to

¹ Petitioner states (Pet. 8) that "in the opinion of the United States Court of Appeals for the District of Columbia * * * no reference whatever is made to the case of *Nye v. United States*." However, in its supplemental opinion denying his petition for rehearing, the court pointed out that implicit in its earlier opinion was a rejection of petitioner's contention based upon the *Nye* decision. The court pointed out that some of petitioner's contempts actually took place in Chief Justice Eicher's courtroom, but stated that "the fact that, in carrying forward [petitioner's] plan to disrupt the trial, *some* of his acts were committed out of the *immediate* presence of the judge did not deprive the court of the right to deal summarily with the wrongful conduct. And there is nothing in the *Nye* case to the contrary." (*Appendix, infra*, p. 19.)

misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice, but extends to "the misbehavior of any of the officers of said courts in their official transactions." It is well settled that an attorney is an officer of the court within the meaning of this clause of the statute; as this Court said in *Clark v. United States*, 289 U. S. 1, 12, "deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office." See also *Ex parte Bradley*, 7 Wall. 364; *United States v. Green*, 85 Fed. 857 (C. C. Colo.); *Ex parte Davis*, 112 Fed. 139 (C. C. Fla.). Plainly, the conduct of petitioner in filing the various motions to summon witnesses and the affidavit of bias and prejudice, to which he affixed his spurious certificate, constituted misbehavior in his official transactions. For his actions occurred during the course of a trial in which he represented two of the defendants and pertained directly to the conduct of the trial (cf. *Matter of Michael*, No. 38, decided November 5, 1945.) Of course, the *Nye* decision has no application to this type of contempt.

But even under the rule of the *Nye* case, petitioner is in no better position.

The motions to subpoena witnesses at government expense and the affidavit of bias and prejudice, which were the bases of the contempt citation, were filed with the court. All the documents were filed during the actual progress of

the trial. And as the Court of Appeals pointed out in its supplemental opinion (*infra*, p. 18), the affidavit of bias and prejudice was placed on the Clerk's desk in Chief Justice Eicher's courtroom itself and the docket entry shows that it was denied the same day (R. 150). But whether the filing of these documents, which both courts below found obstructed the orderly administration of justice, occurred in the courtroom itself or in the clerk's office adjacent thereto, is unimportant. This Court has held that, within the meaning of the statute, "the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." *Savin, Petitioner*, 131 U. S. 267, 277.²

The *Nye* decision is therefore not controlling. It did not involve contempt in the presence of the court, but only the question whether misbehavior more than one hundred miles from the courthouse was "so near thereto" as to fall within the statute. The opinion does not overrule the *Savin* case or *Cooke v. United States*, 267 U. S. 517; on the contrary, it indicates an approval of the doctrine of those and similar cases (313 U. S.

² In the *Savin* case the misbehavior, an attempt to deter a witness from testifying, occurred in a witness room and in a hall of a courthouse. See also *Cooke v. United States*, 267 U. S. 517, where a derogatory letter respecting a trial just concluded and several others yet to be heard was delivered to the judge at his chambers.

at pp. 48-49); and the *Savin* case is cited as an instance of misbehavior in the presence of the court (313 U. S. at p. 49).³

III

Finally, petitioner asserts (Pet. 4, 10-12) that he was entitled to a jury trial on the contempt charges. He concedes that at common law a defendant in a contempt case was not entitled to trial by jury, but he urges that recent decisions of this Court, such as *Nye v. United States, supra*, and *Bridges v. California*, 314 U. S. 252, indicate that the right should be recognized. However, he makes no effort to point out in what respects those cases indicate a recognition of the right, and we are aware of nothing in either of them which purports to change the common law rule.

³ *Schmidt v. United States*, 115 F. 2d 394 and 124 F. 2d 177 (C. C. A. 6), is not in point. In the second opinion the court held that the filing of certain affidavits in the clerk's office was not, under the circumstances of the particular case, an act committed in the presence of the court or so near thereto as to obstruct the administration of justice since it did not appear that the court was in session at the time. In the instant case, not only was the trial in progress when most of the motions and affidavits were filed, but they were very different from those filed in the *Schmidt* case, which were statements obtained from grand jury members regarding certain evidence presented to them. See 115 F. 2d at pp. 395-396. In any event, we think the reasoning of the *Schmidt* decision is not consonant with the *Savin* decision, *supra*, which, as we have shown, was not overruled in the *Nye* case. Compare with the *Schmidt* case, *In re Presentment by Grand Jury of Ellison*, 44 F. Supp. 375 (D. Del.),

affirmed, 133 F. 2d 903 (C. C. A. 3), certiorari denied, 318 U. S. 791.

It has long been established that although proceedings to punish for criminal contempt have a number of characteristics of criminal proceedings, they are *sui generis* and are not criminal prosecutions within the purview of the Fifth and Sixth Amendments in respect to the mode of accusation and method of trial. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 39; *Savin, Petitioner, supra*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489; *Gompers v. United States*, 233 U. S. 604, 610; *Ex parte Hudgings*, 249 U. S. 378, 383; *Myers v. United States*, 264 U. S. 95, 104-105. Appellant's reference to the development of the law of contempt in England (Pet. 11-12) is beside the point. The law on this question was settled by this Court in the *Eilenbecker* case, *supra* (134 U. S. at p. 36):

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or unsettled question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
FRED E. STRINE,
PHILIP R. MILLER,
Attorneys.

NOVEMBER 1945.

APPENDIX
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA
No. 8757
Filed May 8, 1945
JAMES J. LAUGHLIN, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE
UPON PETITION FOR REHEARING

Appellant complains that in our opinion we left undecided the applicability—on his appeal—of the decision in *Nye v. United States*, 313 U. S. 33. His contention is that in his case, as in the *Nye* case, the acts of which he was adjudged guilty were committed out of the presence of the court and not so near thereto as to obstruct the administration of justice.

A short answer to this is that the contempts as found by Judge Bailey and as affirmed by us, i. e., the continued untimely filing—for improper purposes—of motions for subpoenas and the filing of the affidavit of bias,¹ which Judge Bailey and

¹ Appellant's testimony before Judge Bailey as to the filing of the motion to disqualify Judge Eicher for bias is that it "was placed on the Clerk's desk in Chief Justice Eicher's Court," at 4:10 or 4:15 April 26th. The docket record shows that the motion was denied by Judge Eicher the same day.

we found obstructed the orderly administration of justice, took place in the courtroom, or maybe, in some instances, in the Clerk's Office, and whether in the one or in the other, in every instance, in the actual progress of the trial in which appellant was actively of counsel (*Savin, Petitioner*, 131 U. S. 267). If this fact is not implicit in our opinion, the opinion should be considered as amended accordingly.

The fact that, in carrying forward appellant's plan to disrupt the trial, *some* of his acts were committed out of the *immediate* presence of the judge did not deprive the court of the right to deal summarily with the wrongful conduct. And there is nothing in the *Nye* case to the contrary.

Petition denied.

(27) DEC 7 1945

CHARLES ELMORE DUGPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF ON BEHALF OF PETITIONER

JAMES J. LAUGHLIN,
National Press Building,
Petitioner in Proper Person.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN,

vs.

Petitioner,

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF ON BEHALF OF PETITIONER

The opposition filed by the United States in this case relies upon the authority of *Ex Parte Savin*, 131 U. S. 267. In that case this Court stated:

“We are of the opinion that within the meaning of the statute, the Court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such places is misbehavior in the presence of the Court.”

It could well be that if this Court had not announced its decision in the case of *Nye v. United States*, 313 U. S. 33, the acts charged against the petitioner may have been

within the rule of the *Savin* case. It should be pointed out again that two allegations were made against the petitioner:

1. Certain motions were filed to summon witnesses, and the charge was made that the motions were not filed in good faith.
2. An Affidavit of Bias and Prejudice was filed against the presiding Judge, Hon. Edward C. Eicher.

With respect to the motions, since the sedition trial was never proceeded to a conclusion, no one can say that the motions were not filed in good faith. With respect to the Affidavit of Bias and Prejudice, it must be borne in mind that the affidavit was executed by the client, Robert Noble, and the petitioner merely certified that same was filed in good faith. The Affidavit of Bias and Prejudice, therefore, raises an interesting and serious question. It is true that the allegations contained in the Affidavit of Bias and Prejudice are rather startling. However, no one in this country can say beyond contradiction that the allegations are untrue. There was testimony offered at the trial of petitioner to the effect that the late President Roosevelt had inspired the indictments in the sedition case and that he was very anxious to bring about a conviction. Witnesses testified to the effect that there was a deal between the late President Roosevelt and the late Judge Eicher. Certainly no one can say beyond any question of a doubt that this was not so. We cannot close our eyes to the fact that many things have happened in this country in the past ten years to weaken the confidence of the public insofar as certain members of the judiciary are concerned. We dislike to believe that any Judge of a Court of the United States will not live up to the exaltant requirements of his office. Nevertheless we know from the cruel facts before

us that certain members of the judiciary have been sent to the penitentiary, certain others have been admitted to hospitals for the insane, and certain others are under criminal indictments.

Very early in the sedition trial it became apparent that something was wrong. When a group of attorneys join together as they did in the sedition case and accuse the trial judge of bias and prejudice, and suggest politely to him that he withdraw, then we have a very unusual situation. That is exactly what happened in the sedition case. The record of this Court shows that a motion for disqualification of Chief Justice Eicher was filed, and said motion reads as follows:

"MOTION FOR DISQUALIFICATION OF CHIEF JUSTICE EICHER

"Now come the undersigned attorneys representing defendants opposite their names and petition the Honorable Edward C. Eicher presiding herein to enter an order disqualifying himself from further proceeding in this case. This motion is based upon the common law grounds requiring absolute impartiality in the trial judge and the motion is also by virtue of Sections 24 and 25, Title 28, U. S. Code (Section 20, Judicial Code). This motion is filed after the most careful consideration and deliberation and after consultation of the attorneys with each other and all attorneys signing this motion have expressed their sentiments in accordance with the motion after having observed the conduct of Chief Justice Eicher since these proceedings opened on Monday, April 17, 1944.

"Wherefore, the undersigned, officers of this Court state that in their deliberate and considered judgment the ends of justice require that Chief Justice Eicher forthwith disqualify himself, proceed no further herein and assign said cause to another judge.

"In so stating we point to the fact that since the filing of this indictment the record in this case clearly shows that the conduct of Chief Justice Eicher has specifically shown bias and prejudice against the

defense and in favor of the prosecution, has grossly restricted the scope of the attorneys in their representation of their clients, has made arbitrary rulings without support in law and in other ways has violated the constitutional safeguards of each of said defendants.

"Personal bias and prejudice being thus shown and having existed since the date of the filing of the indictment down to the date of the filing of this motion as set forth in Section 20 of the Judicial Code, we respectfully submit this motion should be carefully considered by Chief Justice Eicher and that upon consideration that the same be granted."

And this motion was signed by the following attorneys, and the majority of the said attorneys were court-appointed:

"Albert W. Dilling, Attorney for Elizabeth Dilling;

"James J. Laughlin, Attorney for Smythe and Noble;

"J. Austin Latimer, Attorney for James True and George E. Deatherage;

"Maximilian St. George, Attorney for Joseph E. McWilliams;

"Ira Chase Koehne, Attorney for Broenstrupp, Elmhurst, Washburn and Clark;

"William J. Powers, Attorney for William Dudley Pelley;

"Elizabeth R. Young, Attorney for Charles B. Hudson;

"Frank H. Myers, Attorney for William R. Lyman, Jr.;

"Ethelbert B. Frey, Attorney for Robert Edwards Edmundson;

"Ode L. Rankin, Attorney for Elizabeth Dilling;

"W. Hobart Little, Attorney for David Baxter;

"E. Hilton Jackson, Attorney for Gerald B. Winrod;

"George Seifkin, Attorney for Gerald B. Winrod;

"John W. Jackson, Attorney for Gerald B. Winrod;

"Henry H. Klein, Attorney for Eugene Nelson Sanctuary;

"Marvin F. Bischoff, Attorney for J. Garner."

It is doubtful whether there has been any case in the history of the administration of justice in the District of Columbia or in any Federal Court throughout the United States where a great body of attorneys expressed their disapproval of the presiding judge as was done in this case. Therefore, having that in mind and it being the view of all these attorneys that it was impossible to obtain a fair trial before Chief Justice Eicher, then the Affidavit of Bias and Prejudice, the subject matter of the present proceeding, is not far removed.

The recent case of Irwin Steingut, Petitioner, v. Daniel F. Imrie, a Justice of the Supreme Court of the State of New York, has some application here. That case was decided by the Appellate Division of the Supreme Court, Third Department, on November 14, 1945.

In the *Steingut* case, Justice Heffernan stated:

"The uncontradicted evidence is that appellant was confronted not with legal proof but merely with hearsay statements, insinuations and conclusions of the prosecutor.

"Apparently appellant was convicted not because of any violation of the Judiciary Law but for a violation of some rule of public policy. Again quoting from the opinion of the court below the learned justice said: 'The application of such a rule of public policy makes it relatively unimportant whether or not there is before me sound proof of the correctness of the items or totals of the figures of disbursements'. * * *

"He could not be compelled to explain something which he did not concede to be true, or which was not established clearly by competent evidence. Otherwise, there would be cast upon him a burden of proof concerning a disputed matter, a burden which no defendant in a criminal inquiry is obliged to assume."

That seems to have considerable application in this case. The contention is made that the Affidavit of Bias and Prejudice was not filed in good faith. The petitioner contended throughout that it was filed in good faith. Therefore the words of Justice Heffernan:

"He could not be compelled to explain something which he did not concede to be true, or which was not established clearly by competent evidence. Otherwise, there would be cast upon him a burden of proof concerning a disputed matter, a burden which no defendant in a criminal inquiry is obliged to assume."

And further in the opinion of Justice Heffernan we find this:

"In my opinion appellant has been adjudged guilty of criminal contempt and sentenced to prison and also fined not because he violated any law of the land but because he failed 'to successfully attack the credibility' of a report based on hearsay, conjecture and rumor. A citizen should not be deprived of his liberty or his property on such unwarranted accusations unsupported as they are by legal proof of guilt. To permit such a judgment to stand would be a gross injustice to appellant and a grave reflection on our system of jurisprudence."

In the case before us, who can say that we will not, in the not too distant future, obtain all the facts and circumstances as to the late President Roosevelt's handling of the affairs of state. If the judgment of the Court below is permitted to stand on the meager evidence now in the record and it later develops that there was an arrangement between the late President Roosevelt and the late Judge Eicher to bring about a conviction of the defendants in the sedition case, then there would truly be a grave miscarriage of justice. It should never be forgotten that the Affidavit of Bias and Prejudice was signed by the defend-

ant Robert Noble and not by the petitioner. In fact, the petitioner has contended throughout that he believed it to be his duty to certify to the Affidavit of Bias and Prejudice and the cases, in the view of petitioner, do not hold that petitioner is vouching for the truth of the allegations contained in the Affidavit of Bias and Prejudice, but is merely certifying to the good faith of the defendant in executing said affidavit.

In view of what has been stated we believe the questions are serious and important, and that the Court of Appeals has not given proper effect to the ruling of this Court in the *Nye* case, and the opinion of the Court of Appeals is in direct conflict with the opinion of the Sixth Circuit in the case of *Schmidt v. United States*, 124 F. 2d 177, and therefore the petition for writ of certiorari should be granted.

JAMES J. LAUGHLIN,
National Press Building,
Petitioner in Proper Person.

(1666)